Office - Supreme Court
FILED
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ALEXANDER L. STEVAS,
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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 28, 1982
Certiorari Granted November 15, 1982

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No. C 80-77

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS,
Plaintiff,

vs.

ERATO SHIPPING, INC.,
THE INTERNATIONAL TRUST COMPANY OF LIBERIA,

and

PALLAS SHIPPING AGENCY, LTD.,
THE INTERNATIONAL TRUST COMPANY OF LIBERIA,

and

JAPAN LINE LIMITED,

and

REGENT BOTAN SHIPPING, INC.,
Defendants.

RELEVANT DOCKET ENTRIES

4/ 8/80	4	*AMENDED COMPLAINT* with jury demand and request for production of documents filed.
7/25/80	6	MOTION by deft. Pallas to Quash and to Dismiss filed. Mld.
8/ 6/80	7	OPPOSITION of pltf. to motion of deft. Pallas to quash and dismiss fld. Mld.

8/18/80		MOTION and ORDER granting deft. Pallas to 8/29/80 to file a reply brief to pltf's. opposition to motion to quash and dismiss filed. NJW. Copies 77(d) to: Gallagher and Denny.
8/26/80	8	Reply brief of Pallas in support of motion to quash and dismiss filed. Mld.
3/25/81	11	OPINION and ORDER filed. NJW. Motion of deft. Pallas to dismiss granted. Motions for default and stay are overruled. Cause dismissed without prejudice. Copies 77(d) to: Gallagher and Denny.
3/25/81	12	JUDGMENT ON DECISION BY THE COURT filed. NJW. Case dismissed without prejudice. True copies to: Gallagher and Denny.

No. C 80-77

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

AMENDED COMPLAINT, DEMAND FOR JURY, REQUEST FOR PRODUCTION OF DOCUMENTS

(Filed April 8, 1980)

FIRST CAUSE OF ACTION

Now comes the plaintiff Joseph Duris, by and through counsel and for his cause of action herein alleges and avers as follows:

1. Plaintiff is a citizen and resident of the City of Toledo, State of Ohio, United States of America; that he was severely injured while in the course of his duties as a longshoreman employed by the Toledo Overseas Terminal, Inc., a subsidiary of the Edward J. DeBartolo Corporation, and was so employed at said corporation's Toledo, Ohio waterfront facilities on May 19, 1979.

2. Defendant Erato Shipping, Inc. is a business organization organized and existing under and by virtue of the laws of Liberia.

3. Defendant Japan Line Limited is a business organization organized and existing under and by virtue of the laws of Japan.

4. Defendant Regent Botan Shipping, Inc. is a business organization organized and existing under and by virtue of the laws of Panama.

5. That by reason of the diversity of citizenship by and between the parties hereto, and that the damages are in excess of $10,000.00 this Honorable Court has jurisdiction of the action herein.

6. That this action is timely commenced and within the period of time so prescribed by the laws of the State of Ohio by virtue of Section 2305.15, commonly referred to as the "Savings Clause", which provides that the applicable statute of limitations for a cause of action does not begin to run and does not run during times in which defendants, as is the situation in the present case, are out of the state, or have absconded, or have concealed themselves from the plaintiff abovementioned.

7. That this Court has personal jurisdiction over the person of the defendants herein by virtue of Ohio Revised Code Section 2307.382, which provides such powers,

in part, over any person acting directly or as an agent in transacting business in this state or causing tortious injury by an act or omission in this state.

8. That plaintiff originally commenced an action against Regent Botan Shipping Company of Panama which action was filed as Case Number C 77-171 on April 12, 1977; that service of process upon said defendant could not be obtained with all due diligence and that this Court in an Order of August 9, 1977 granted plaintiff until August 31, 1977 to show why said action should not be dismissed for want of prosecution; that plaintiff, through counsel, on August 26, 1977 filed a Response to Motion to Show Cause upon the grounds that said defendant's address could not be found, and that plaintiff believed that the attorneys representing said defendant would make an appearance but failed to do so; that plaintiff then attempted service upon the then defendant, Regent Botan Shipping Company through the U.S. Marshall in Hong Kong on August 25, 1977; that plaintiff on October 4, 1977 filed a Motion for Extension of Time for Service on the grounds that U.S. Marshall's office advised plaintiff's attorneys that a delay of several months could occur before a return of service was received from Hong Kong; that on October 5, 1977 this Motion was approved and said extension was so ordered; that plaintiff filed a Motion for Service by Publication on January 23, 1978 along with plaintiff's counsel's affidavit of unknown residency of defendant; that service by publication was received by this Court in a Notice of January 24, 1978; that attorneys for the defendant on March 27, 1978 filed a Motion to Quash Service by Publication and to dismiss complaint for lack of in personam jurisdiction, accompanied by a Memorandum; that on April 17, 1978 this Honorable Court dismissed the abovementioned action without prejudice to the plaintiffs; that plaintiff again filed suit in this Honorable Court on May 17, 1978 against the

defendants herein, in addition to Asian Shipping, Limited and Toko Kaiun Kabushiki Kaisha, both of Japan, which case was filed as Case Number C 78-218, as well as the appropriate U.S. Marshall's Service Process Receipt and return for each of the defendants therein and that service upon defendant Erato Shipping, Inc. was not perfected, in that the Marshall was unable to locate said defendant at that time; that the defendants to said action were given until September 25, 1978 to file their answer, move, or otherwise plead by Court Order filed July 25, 1978; that plaintiff's counsel on August 14, 1978 filed with this Court an Affidavit of Unknown Residency of the Defendant Erato Shipping, Inc.; that defendants Japan Line Limited, Asian Shipping Limited, and Toko Kaiun Kabushiki Kaisha filed a Motion to Dismiss the plaintiff's complaint as to each of them on September 13, 1978; that plaintiff was given until November 10, 1978 in which to respond to the defendant's aforementioned Motion to Dismiss by stipulation of parties and order of this Court filed on October 17, 1978; that this Court ordered again by stipulation of parties that plaintiffs be granted until February 9, 1979 in which to respond to defendant's aforementioned Motion to Dismiss, which order was filed on November 14, 1978; that said cause was transferred from the Honorable Judge Don Young's docket to the docket of the Honorable Judge Nicholas Walinski by Order filed December 6, 1978; that plaintiff filed a Motion for Service by Publication on December 14, 1978 against defendant Erato Shipping, Inc. which Motion was so ordered; that plaintiff filed Written Interrogatories and a Request for Production with this Court on December 28, 1978 and certified that a copy of same had been mailed that same day to Attorney Douglas R. Denny of Cleveland, Ohio, attorney for the defendant Japan Line Limited; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service by

registered mail in care of Shinwa Kaiun K.K., Matsumoto Building, I, Kyo Bashi, I-Chome, Chuo-Ku, Tokyo, Japan on December 29, 1978; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service in care of the Secretary of the State of Ohio, Corporations Department on December 18, 1978; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service in care of Erato Shipping, Inc., 1 World Trade Center, Suite 2855, New York, New York 10048 on February 1, 1979; that plaintiff's counsel filed its Motion in Opposition to Defendant's Motion to Dismiss and Supporting Memorandum on February 9, 1979; that defendants Japan Line Limited, Asian Shipping Limited and Toko Kaiun Kabusiki Kaisha filed a Motion for Leave to File Reply Brief on February 20, 1979, which leave was ordered February 20, 1979; that said Case Number C 78-218 was dismissed by this Honorable Court on March 30, 1979; that plaintiff filed a Motion for Reconsideration of the case and Supporting Memorandum on April 4, 1979; that this Court in an Order of April 19, 1979 reinstated the case docketed as Case Number C 78-218; that a Brief of Amicus Curiae and Affidavit and Motion for Leave to File Brief of Amicus Curiae with Brief attached of Attorney Douglas Denny was filed in this Court on April 26, 1979 and such Motion was Ordered by the Court; that plaintiff filed a Motion for Leave to File Reply Brief on May 11, 1979 and that said Motion was so ordered on May 14, 1979; that plaintiff did file a Reply Brief on May 29, 1979; that this Honorable Court again dismissed this case, docketed as Case Number C 78-218 on June 20, 1979; that plaintiff filed a Motion to Reconsider and Supporting Memorandum with this Court on July 5, 1979 which Motion was overruled on August 2, 1979; that plaintiff through counsel, filed a Notice of Appeal with this Court on August 31, 1979; that in response

Attorney Douglas R. Denny filed a Motion for Leave to Appear as Amicus Curiae and Motion to Dismiss Appeal on September 13, 1979 to which the plaintiff filed a Motion in Opposition to Amicus Curiae's Motion to Dismiss Appeal on October 2, 1979; plaintiff subsequently and through counsel moved for a Voluntary Dismissal of Appeal on November 5, 1979, which dismissal was granted by this Honorable Court in an Order filed November 8, 1979.

9. Further, the plaintiff Joseph Duris states that on or about the 19th day of May, 1975, while pursuing his duties as a harbor worker, he sustained injuries aboard the vessel Regent Botan in the Port of Toledo, Lucas County, Ohio, which vessel was owned and operated by the Regent Botan Shipping Company, and at that time leased to the defendant Erato Shipping, Inc. on a bareboat charter; that defendant Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd. on or about November 16, 1977, which corporation then and there assumed all assets and liabilities of said Erato Shipping, Inc., including the claim stated herein, and also that at the time of the accident to Mr. Duris, the M/V Regent Botan was leased by Erato Shipping, Inc. to defendant Japan Line Limited under the formality of a time charter.

10. That the injuries sustained by plaintiff were due directly and proximately to the negligence of the defendants in maintaining the companion ways, ladders, and other instrumentalities of said vessel in a negligent fashion, when the defendants knew, or in the exercise of ordinary care, should have known that the plaintiff and others similarly situated would be required to pass over, through, and upon said appurtenances.

11. The plaintiff further states that as a direct and proximate result of the negligence of the defendants, he fell from a negligently maintained ladder and suffered injuries

to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

WHEREFORE, plaintiff prays judgment against the defendants in the sum of ONE MILLION DOLLARS ($1,000,000.00) and for his costs of Court herein.

SECOND CAUSE OF ACTION

12. Now comes the plaintiff and for his Second Cause of Action incorporates herein all of the allegations of the First Cause of Action as if the same were fully rewritten and further states that the defendant Erato Shipping, Inc was at all times pertinent a bareboat charterer of the vessel M/V Regent Botan by virtue of an agreement dated December 25, 1972 by and between Erato Shipping, Inc. and the owner of the vessel the defendant Regent Botan Shipping Company, a copy of which is attached hereto and marked as Exhibit "A". Further, plaintiff states that defendant Erato Shipping, Inc. incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer.

13. That on or about the 16th day of November, 1977, the defendant Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd., and that as a result of said merger the defendant Pallas Shipping Agency, Ltd. assumed all

assets and liabilities of the defendant Erato Shipping, Inc., including the plaintiff's claim stated herein.

14. Plaintiff states further that as the bareboat charterer of said vessel the defendant Erato Shipping, Inc. by and through its agents and employees, did conduct negligent activity in the state of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy, which negligence the defendant Pallas Shipping Agency, Ltd. assumes by virtue of the merger described hereinabove.

15. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Erato Shipping, Inc., and Pallas Shipping Agency, Ltd., he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal, and related care in the approximate sum of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

16. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendant, and that he has to this point been unsuccessful only by virtue of the nature of the defendant corporations which will be further explained hereinafter and that said defendants

have absconded, and otherwise concealed themselves so as to avoid service by plaintiff and therefore the statute of limitations is tolled as to these defendants.

WHEREFORE, plaintiff Joseph Duris prays judgment against the defendants Erato Shipping, Inc. and Pallas Shipping Agency, Ltd. in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

THIRD CAUSE OF ACTION

17. Now comes the plaintiff and for his Third Cause of Action incorporates herein all of the allegations of the First and Second Causes of Action as if the same were fully rewritten herein and further states that defendant Japan Lines Limited at all times pertinent, although listed as a time charterer in an agreement between defendant Erato Shipping, Inc., and Japan Lines Limited, was in actuality the bareboat charterer of the vessel M/V Regent Botan; said document (a copy of which is attached hereto and marked as Exhibit "B") having been executed and entered into on December 25, 1972, the same date and for the same period of time as the supposed bareboat charter between defendants Regent Botan and Erato Shipping, Inc.

18. Further, plaintiff states that defendant Japan Lines Limited incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer.

19. Further, plaintiff states that defendant Japan Lines Limited also incurs all liability for the aforementioned tortious acts and omissions upon the vessel Regent Botan by virtue of the fact that its status as a time

charterer of said vessel was established by fraud, deception, and in the unconscionable interest of creating a false corporate layer in an attempt to defraud creditors and claimants, including individuals in plaintiff's position; that defendant Japan Lines Limited fraudulently created and/or enlisted the support of the defendant Erato Shipping, Inc. as a sham corporation; that defendant Erato Shipping, Inc. is and was not properly created and capitalized in recognition of the applicable laws of incorporation and that defendant Japan Lines Limited was fully aware of this situation; that officers and directors of the abovementioned defendants created conflicts of interest in clear breach of their fiduciary duties with the aims of defrauding creditors and claimants and unlawfully escaping liability; as a consequence of the foregoing that defendant Japan Lines Limited stands in the stead of defendant Erato Shipping, Inc.; that in actuality defendant Japan Lines Limited is the effective bareboat charterer of the vessel Regent Botan and as such is fully liable to plaintiff Joseph Duris for injuries he sustained upon said vessel.

20. Plaintiff states further that as the bareboat charterer of said vessel the defendant Japan Lines Limited, by and through its agents and employees, did conduct negligent activity in the State of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy.

21. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Japan Lines Limited, he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum

of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

22. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendants, and that he has to this point been unsuccessful only by virtue of the fraudulent and sham transactions referred to hereinabove, and also by the defendant Japan Lines Limited's fraud and misrepresentation of its capacity as a true party liable for tortious acts and omissions upon the vessel Regent Botan.

WHEREFORE, plaintiff Joseph Duris prays judgment against the defendant Japan Lines Limited in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

FOURTH CAUSE OF ACTION

23. Now comes the plaintiff and for his Fourth Cause of Action incorporates herein all of the allegations of the First, Second, and Third Causes of Action as if the same were fully rewritten herein, and further states that defendant Regent Botan at all times pertinent was and is the registered owner of the M/V Regent Botan and at the time of the injury to plaintiff as aforesaid stand in the position

of true owner and/or bareboat charterer and as such is responsible for the tortious conduct as alleged hereinabove, and as such has had sufficient activity within this State to allow service upon this defendant.

24. Plaintiff respectfully submits that defendant Regent Botan at all times pertinent remains in the position of owner of the vessel M/V Regent Botan and as such owner incurs liability for the tortious acts of its agents, employees, etc., as aforementioned and that the bareboat charter allegedly entered between Regent Botan and Erato Shipping, Inc. was a sham created to shield the defendant Regent Botan Shipping Company from liability in such cases as is presented herein.

25. Further plaintiff states that defendant Regent Botan Shipping Company incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer and/or owner.

26. Further, plaintiff states that defendant Regent Botan Shipping Company also incurs all liability for the aforementioned tortious acts and omissions upon the vessel Regent Botan by virtue of the fact that its status as a grantor of bareboat charter of said vessel was established by fraud, deception, and in the unconscionable interest of creating a false corporate layer in an attempt to defraud creditors and claimants, including individuals in plaintiff's position; that defendant Regent Botan Shipping Company fraudulently created and/or enlisted the support of the defendant Erato Shipping, Inc. as a sham corporation, that defendant Erato Shipping, Inc. is and was not properly created and capitalized in recognition of the applicable laws of incorporation and that defendant Regent Botan Shipping Company was fully aware of this situation; that officers and directors of the abovementioned defendants

created conflicts of interest in clear breach of their fiduciary duties with the aims of defrauding creditors and claimants and unlawfully escaping liability; as a consequence of the foregoing that defendant Regent Botan Shipping Company stands in the stead of defendant Erato Shipping, Inc.; that in actuality defendant Regent Botan Shipping Company is the effected owner/bareboat charterer of the vessel Regent Botan and as such is fully liable to plaintiff Joseph Duris for injuries he sustained upon said vessel.

27. Plaintiff states further that as the bareboat charterer/owner of said vessel the defendant Regent Botan Shipping Company, by and through its agents and employees, did conduct negligent activity in the State of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy and unsafe.

28. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Regent Botan Shipping Company, he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum of $5,000.00; that he will continue to incur medical related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

29. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendants, and that he has to this point been unsuccessful only by virtue of the fraudulent and sham transactions referred to hereinabove, and also by the defendant Regent Botan Shipping Company's fraud and misrepresentation of its capacity as a true party liable for tortious acts and omissions upon the vessel Regent Botan.

WHEREFORE, plaintiff Joseph Duris prays judgment against these defendants in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

DEMAND FOR JURY

Now comes the plaintiff and hereby requests a trial by a jury on all issues triable of right herein.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

REQUEST FOR PRODUCTION OF DOCUMENTS

Now comes the plaintiff by and through his attorney and respectfully requests the defendants to produce copies of any and all insurance policies that may be applicable to the allegations and claims contained within the complaint and requests that said production be made within twenty-eight (28) days from the receipt of this request, pursuant to the Ohio Rules of Civil Procedure.

Also, you are similarly requested to produce copies of any and all statements of the plaintiff or plaintiffs given to you and/or your representatives relative to the allegations and claims contained within this complaint.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By THOMAS W. GALLAGHER
Attorney for Plaintiff

Civil Action No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed July 25, 1980)

Now comes named defendant Pallas Shipping Agency, Ltd., and moves this Honorable Court for an order quashing the service by mail herein pursuant to Rule 12(b)(5)

of the Federal Rules of Civil Procedure and for an order dismissing the complaint as to it pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the grounds that this Court does not have *in personam* jurisdiction in accordance with the reasons set forth in the accompanying memorandum as supported by the attached affidavit of Mr. C. T. Yang, annexed hereto as Exhibit "A".

Alternatively, named defendant Pallas Shipping Agency, Ltd. moves this Honorable Court for an order dismissing plaintiff's complaint as to it, with prejudice, on the ground that it is time barred by the running of the applicable statute of limitation.

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

SUPPORTING MEMORANDUM

A. DEFENDANT PALLAS SHIPPING AGENCY, LTD. IS NOT SUBJECT TO LONG-ARM MAIL SERVICE, AND ACCORDINGLY THE ATTEMPTED SERVICE UPON IT SHOULD BE QUASHED AND PLAINTIFF'S COMPLAINT DISMISSED AS TO IT FOR WANT OF IN PERSONAM JURISDICTION

The docket in this case will reflect that on April 7, 1980, counsel for plaintiff served a motion for leave to file an amended complaint by which a new defendant was named, namely Pallas Shipping Agency, Ltd. Although the Court has not ruled formally upon said motion, for

the purposes of the present motion defendant Pallas Shipping Agency, Ltd. assumes that the amendment of plaintiff's complaint will be permitted by the Court.

Subsequent to the filing of said motion to amend the complaint, plaintiff caused to be served by mail a copy of the amended complaint upon Pallas Shipping Agency, Ltd. through its corporate agent, the International Trust Company of Liberia.

As indicated in Paragraph 7 of said amended complaint, plaintiff presumably has alleged jurisdiction over defendant Pallas Shipping Agency, Ltd. and attempted service upon Pallas pursuant to Rule 4.3(A) of the Ohio Rules of Civil Procedure, commonly known as the "long-arm" statute.

The Due Process clause of the Fourteenth Amendment of the United States Constitution requires a determination that a foreign corporation has certain minimum contacts with Ohio, such that it is fair that a foreign defendant defend a suit brought in Ohio and that substantial justice is done. *Wainscott v. St. Louis-San Francisco Railway,* 47 Ohio St.2d 133 (1976). In the *Wainscott* case, it was held that a foreign railroad corporation having no contracts in Ohio and maintaining two offices in this state for soliciting freight traffic to be carried over out-of-state rail lines, did not have the necessary minimum contacts with Ohio to make it fair for the corporation to defend a suit within this state.

In a long line of cases stemming from the landmark decision of the U.S. Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), it has been consistently held that a foreign defendant must have certain minimum contacts within the territory of the forum such that maintenance of suit against the foreign defendant

does not offend what was then termed "traditional notions of fair play and substantial justice." See *In-Flight Devices Corporation v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir., 1972), for this Circuit's interpretation and application of Ohio's long-arm statute.

As evident by the affidavit of the president of Pallas Shipping Agency, Ltd., sworn to before the American Vice Consul at Hong Kong and attached to this motion as Exhibit "A", the named defendant, Pallas Shipping Agency, Ltd., has never had any contact with the State of Ohio. Accordingly, the attempted service upon Pallas Shipping Agency, Ltd. should be quashed and the complaint dismissed as to it for lack of *in personam* jurisdiction.

B. PLAINTIFF'S CLAIM IS TIME BARRED

Defendant Pallas Shipping Agency, Ltd. moves this Court to dismiss plaintiff's complaint, with prejudice, as to it on the grounds that the amended complaint is time barred. In support of this motion, defendant Pallas Shipping Agency, Ltd. relies upon the arguments advanced in support of the identical motion which is currently pending before this Court on behalf of defendant Japan Line Ltd. Said argument and law is contained in said defendant Japan Line's memorandum in support of motion to dismiss and in its reply memorandum in support of said motion to dismiss.

C. CONCLUSION

Service pursuant to the Ohio long-arm statute upon defendant Pallas Shipping Agency, Ltd. was improper and accordingly should be quashed and plaintiff's amended complaint dismissed as to it. Alternatively, plaintiff's amended complaint should be dismissed with prejudice as

to defendant Pallas Shipping Agency, Ltd. since it is time barred.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
Attorneys for Defendant Pallas Shipping Agency, Ltd.

(Certificate of Service Omitted in Printing)

EXHIBIT A

Consulate General of the)
United States of America) SS:
at Hong Kong)

AFFIDAVIT

C. T. Yang, being first duly sworn, deposes and says:

I am C. T. Yang, President of Pallas Shipping Agency, Ltd. I am a citizen of Hong Kong.

Pallas Shipping Agency, Ltd. is a Liberian corporation of which I am 50 per cent shareholder. The company's Articles of Incorporation were filed with Ministry of Foreign Affairs of Liberia on March 18, 1977. Pallas Shipping Agency, Ltd. maintains its principal place of business in Hong Kong. The company does not maintain an office or place of business in the United States.

Pallas Shipping Agency, Ltd. is not licensed to conduct business in the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. has, since its inception, never conducted or transacted any business within the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. has no agents, employees, representatives, independent contractors, real estate, personal property, offices, equipment, bank accounts, obligations, or assets in the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. never shipped goods through Ohio, never entered into a contract in Ohio, never solicited business in Ohio, and has never had any connection or contact with the State of Ohio, U.S.A. whatsoever.

Further affiant sayeth naught.

/s/ C.T. YANG
C.T. YANG

Sworn to before me this 27th day of June, 1980.

/s/ KEITH POWELL II
KEITH POWELL II
American Vice Consul

[Seal]

No. C80-77

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT PALLAS SHIPPING AGENCY, LTD'S MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed August 6, 1980)

Now comes the plaintiff, Joseph Duris, and moves this Honorable Court for an order denying defendant

Pallas Shipping Agency, LTD's Motion to Quash Service and to Dismiss With Prejudice on the grounds that Pallas Shipping Agency, LTD has assumed both the assets and liabilities of defendant Erato Shipping, Inc., and that defendant Pallas Shipping Agency, LTD is subject to long arm mail service, and that plaintiff's claim herein is not barred by the statute of limitations.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOCIATES COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

MEMORANDUM

A. Defendant Pallas Shipping Agency, LTD has assumed both the assets and liabilities of defendant, Erato Shipping, Inc., and as such is subject to long arm mail service and that plaintiff's Complaint should not be dismissed.

The plaintiff herein, by and through counsel, was advised on April 3, 1980 by Patrick L. Farrell, of the Liberian Corporation Services, Inc., that Erato Shipping, Inc. was merged into Pallas Shipping Agency, LTD, effective November 16, 1977. (Such advisement is attached hereto as "Exhibit A") On April 7, 1980 counsel for the plaintiff served a Motion for Leave to File an Amended Complaint adding Pallas Shipping Agency, LTD as a defendant in the action presently before this Court.

On July 24, 1980, counsel for the defendant Pallas Shipping Agency, LTD, filed a Motion to Quash Service, wherein it was alleged that Pallas Shipping Agency, LTD could not be subjected to long arm mail service in that the

minimum contacts with the State of Ohio required by Rule 4.3(a) had not been met.

The plaintiff respectfully contends that the defendant, Pallas Shipping Agency, LTD, is properly subjected to long arm mail service, and that defendant Pallas Shipping Agency, LTD is in error, for the reasons more fully set forth hereinafter.

Volume 19 Amjur 2d Section 1554, states as follows:

> "Generally speaking, where a corporation succeeds to the assets of another corporation by virtue of consolidation or merger and not by way of purchase, the new or resulting corporation is liable for the debts and contracts of the other corporation, although there is no statute imposing liability and no agreement assuming it. Corporations cannot by consolidation escape the obligation to pay debts incurred before the consolidation or defeat the right of their creditors to subject their property to the satisfaction of such debt. It is immaterial that such liabilities are unliquidated.
>
> The liability of a consolidated corporation or one to which another corporation has been merged, upon the debts and contracts of the predecessor corporation is governed by statute in some states. The statutes quite generally provide that the new corporation *shall be liable* for the debts and contracts of the predecessor.
>
> Some statutes, in providing for consolidation or a merger, declare that such transactions shall be without prejudice to creditors of any one of the corporations. Such a statute is held to give a creditor no rights by virtue of the merger or consolidation to proceed against the successor corporation where no liability is imposed upon it. His remedy is against his debtor by execution on any judgment obtained, against

the property of such debtor, whether or not it is in the possession of the successor corporation." (emphasis added)

Consistent with the above ALR annotation, those Ohio and Liberian statutory provisions clearly state that the successor corporations are responsible for the assets, as well as the *liabilities* of consolidated, or merged corporations.

The Ohio Revised Code Section 1701.82(A)(b) provides the following:

"When a merger or consolidation becomes effective:

The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities to defending shareholders. Any claim existing, or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of appeal, as if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place."

The Liberian code of laws revised, of 1976, Section 10.4(2)(a)(b)(c) is as follows:

"When such merger or consolidation has been effected:

(a) Such surviving or consolidated corporation shall thereafter consistently with its articles of incorporation as altered or established by the merger or consolidation, possess all the rights, privileges, immunities, powers and purposes of the constituent corporation.

(b) All the property, real and personal including subscriptions to shares, causes of action and every

other asset of each of the constituent corporations, shall vest in such surviving or consolidated corporation without further acts or deed.

(c) The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand in any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be in force, prosecuted, settled or compromised as if such merger or consolidation had not occurred, and such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation."

As is apparent from all of the above, that in the November 16, 1977 merger of Erato Shipping, Inc. to Pallas Shipping Agency, LTD, Erato Shipping, Inc. carried with it not only its assets, but its liabilities, and that Pallas Shipping Agency, LTD has assumed both, as a matter of law. It is also apparent that as Pallas Shipping Agency, LTD assumed the privileges of Erato Shipping, Inc., it too assumed the necessary minimum contact with the State of Ohio which Erato Shipping had unquestionably made thus allowing long arm service. Erato Shipping, Inc, by merging with Pallas Shipping Agency, LTD, gave to Pallas Shipping Agency LTD its liabilities, and in particular, this cause of action, subject to the hereinabove described applicable statutory provisions. As such, the plaintiff herein respectfully submits that Pallas Shipping

Agency, LTD was and is properly subjected to long arm mail service, and accordingly, such service should not be quashed. Further, plaintiff respectfully contends that for all of the above, his Complaint should not be dismissed.

B. Plaintiff's claim herein is not barred by the statute of limitations:

The defendant Pallas Shipping Agency, LTD suggests in its memorandum in support of its Motion to Dismiss that "Section 2305.15 of the Ohio Revised Code does not apply to nonresident corporate defendants who are amenable to process during the period of the running of the statute of limitations." (At page 3) This contention is in direct opposition to the unequivocal language of the Court of Appeals for Hamilton County, Ohio, in *Sheer v. Air-Shields, Inc.*, 61 O.App. 2d 205 (1979), Motion to Certify Record overruled by Supreme Court of Ohio, ... O.St. ..... (1979). In the *Sheer* case, the Court cited both *Seeley v. Expert, Inc.* 26 O.St. 2d 61 (1971) and *Durham v. Anka Research Ltd.*, unreported, No. C-88454, First Appellate District, decided on October 25, 1978, holding that "Under the plain and unequivocal wording of the 'Savings Clause' (Revised Code Section 2305.15), tolling is caused by the absence of the defendant from the state, not by its non-amenability to long arm surface." (61 O.App. 2d at 207) In this case, the defendant was a nonresident corporation which the Court found to be within the scope of Section 2305.15 of the Ohio Revised Code, even though the Court found that it was amenable to process by the long arm statute of throughout.

Applying the foregoing to the instant case, plaintiff respectfully suggests that the defendant has absolutely no merit in its assertion that Section 2305.15 does not apply, but rather this Section clearly does apply to toll the statute of limitations while the defendant corporation is absent

from Ohio, even though it has been amenable to service by virtue of long arm statutes. Thus, plaintiff is well within the statute of limitations for commencing this action.

Further, defendant in its memorandum alleges that plaintiff's exclusive remedy in the case at hand is under the longshoreman and harbor worker's compensation act, 33 U.S.C.A. Section 901, *et seq.*, and as such, his claim is barred by the specific provisions of this act. Title 33 U.S.C.A. Section 933(b) requires that a plaintiff commence an action against a third party within six months of acceptance of an award of compensation under the act. However, the defendant makes it clear in his Memorandum that plaintiff has accepted compensation voluntarily and *without* an award.

Although defendant has noted in his brief that some courts have found, under circumstances of specific cases, that informal voluntary payments by an employer constitute an award of benefits in a compensation order, it is clear that such a finding is a result of a subjective test, weighed upon the facts and circumstances of the individual cases, and not capable of determination without a full hearing and presentation of facts and issues. In the case of *Romano v. United States*, 90 F.Supp. 15 (D.C.N.Y. 1950) a longshoreman filed a claim for compensation under the act and as a result of a conference with a claims examiner of the commission, received compensation. The court there held however, "It is clear from the evidence, however, that the compensation was not accepted under an award in a compensation order filed by the deputy commissioner." (at page 16)

In addition to the requirement of a formal award under the Act, the courts have also required that the injured worker not be prejudiced by the assignment of

his claim to his employer after a formal award. Thus, in *Potomac Electric Co. v. Wynn*, 343 F. 2d 295 (App. D.C. 1965) the court refused to bar an injured worker's claim against a third party on the grounds that it had been initiated more than six months after an award, where the injured party's employer refused to prosecute the claim in his stead. The court there held that:

> "Even if the employer-assignee had 'proper motives' or did not abuse a 'fiduciary' duty to the employee in failing to sue the third party, no statutory purpose would be served in precluding the employee from suing . . . The statute is not designed to protect third parties from suit."

It is clear then, that the defendant Pallas Shipping Agency, LTD is not a party intended to be protected by the six month time limit on the longshoreman and harbor worker's compensation act.

CONCLUSION

It is clear that defendant Pallas Shipping Agency, LTD was properly subjected to long arm mail service and that such service should not be quashed, and that their claim is not barred by any statute of limitations or assignment as discussed hereinabove. For the foregoing reasons, plaintiff requests that this Court overrule defendant Pallas Shipping Agency, LTD's Motion for Dismissal in the present lawsuit.

Respectfully submitted,

FRANK W. CUBBON, JR. & ASSOCIATES COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

(Certificate of Service Omitted in Printing)

EXHIBIT A

LIBERIAN CORPORATION SERVICES, INC.

[Addresses Omitted]

Reston, Virginia
April 3, 1980

Thomas W. Gallagher, Esq.
Frank W. Cubbon, Jr. and Associates
Barristers Building
335 North Superior Street
Toledo, Ohio 43604

Re: ERATO SHIPPING, INC.
PALLAS SHIPPING AGENCY, LTD.

Dear Mr. Gallagher:

This is to confirm our recent telephone conversation in response to your letter of April 1, 1980, addressed to the Honorable George E. Cooper, Deputy Commissioner of Maritime Affairs, regarding the above corporations.

In that telephone conversation we relayed to you the advice of our Liberian correspondent, The International Trust Company of Liberia, that:

> ERATO SHIPPING, INC. was merged into PALLAS SHIPPING AGENCY, LTD. effective November 16, 1977. The International Trust Company of Liberia acts as Registered Agent for service of process for both of these corporations pursuant to Section 3.1 of the Liberian Business Corporation Act.

The Trust Company's address is as follows:

The International Trust Company of Liberia
80 Broad Street
P. O. Box 292
Monrovia, Liberia

Service of process on The Trust Company in its capacity as Agent should be directed to the attention of Mr. A. T. Balsden or Mr. G. F. Kummer.

Further to your request, we enclose a copy of the Liberian Business Corporation Act (1977), The Liberian Corporation Law of 1948, and a photocopy of Chapter 3 (Commencement of Action) of Part 1 of Title 1 (Civil Procedure Law) of the Liberian Code of Laws Revised.

We have also advised you that although we act as a correspondent for The Trust Company in some manners, we have no authority to accept a forward service of process on their behalf.

Yours truly,

/s/ PAT FARRELL
PATRICK L. FARRELL
General Counsel

PLF/cp
Enclosures

No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE REPLY BRIEF

(Filed August 18, 1980)

Now comes Pallas Shipping Agency, Ltd. and moves this Honorable Court pursuant to Rule 3(A)4 of the Rules of the United States District Court for the Northern District of Ohio, for leave to file a brief for the reason that plaintiff's motion in opposition to defendant Pallas Shipping Agency's motion to quash service and to dismiss with prejudice contains new matter regarding the merger of defendant Erato Shipping into Pallas Shipping Agency which defendant Pallas Shipping Agency, Ltd. should have a right to distinguish.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

REPLY BRIEF TO BE FILED BY AUGUST 29, 1980.
IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
United States District Judge

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: August 18, 1980 James S. Gallas, Clerk

No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

REPLY BRIEF OF PALLAS SHIPPING AGENCY, LTD. IN SUPPORT OF MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed August 26, 1980)

Contrary to movant's position, as supported by affidavit, that it has never had any contact with the State of Ohio, plaintiff still asserts that this Court can maintain *in personam* jurisdiction.

The basis of plaintiff's position is that he was advised by a company known as Liberian Corporation Services, Inc. by letter dated April 3, 1980, that "Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd., effective November 16, 1977." This letter indicates that a Liberian bank advised the writer that the alleged merger took place. It is neither sworn to under oath nor otherwise sufficient to establish this. Plaintiff then makes the totally unsupported conclusion:

> ". . . It is also apparent that as Pallas Shipping Agency, Ltd. assumed the privileges of Erato Shipping, Inc., it too assumed the necessary minimum con-

tact with the State of Ohio which Erato Shipping had unquestionably made thus allowing long arm service. . . ." p. 4 of Plaintiff's Brief.

Even assuming arguendo that defendant Erato Shipping, Inc. had the necessary minimum contact with Ohio, there is nothing before the Court to indicate that Pallas Shipping Agency, Ltd., agreed to submit to the Court's jurisdiction. By plaintiff's own admission it wasn't until April 7, 1980 that it served its Motion for Leave to Amend its Complaint adding as a named defendant Pallas Shipping Agency, Ltd. It was almost 2-1/2 years after any agreement between Erato and Pallas that Pallas even was notified of this matter.

A check of the Court dockets, reflects that the first time suit was commenced against Erato Shipping, Inc. was in *Joseph E. Duris v. Japan Line Limited, et al.*, Civil Action No. C78-218, in which the Complaint was filed May 17, 1978. Hence, *even* Erato was unaware of this matter in November, 1977, at the time of the alleged agreement between Erato and Pallas.

Even ---------

Assuming there was a valid corporate merger between Pallas and Erato in November, 1977. . .

Assuming that said merger included Pallas assuming *all* aspects of outstanding liabilities and contingent claims against Erato. . .

Assuming plaintiff's claim against Erato was not time-barred in November, 1977. . .

Assuming Erato is subject to this Court's jurisdiction. . .

Requiring named defendant Pallas Shipping Agency, Ltd. to submit to the jurisdiction of this Court offends even

the most liberal standards of fair play and substantial justice and certainly is not within the jurisdiction encompassed by Ohio's "'Long Arm" statute. See *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945).

Certainly, Pallas Shipping Agency, Ltd. can claim surprise and surprise is one factor which has been identified as making the assertion of jurisdiction over a non-resident unfair in a given case. *In-Flight Devices Corporation v. Van Dusen Air, Inc.,* 466 F.2d 220, 233 (6th Cir., 1972); see also Currie, "The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois," 1963 Univ. of Illinois L.F. 533, 535.

Plaintiff, upon whom the burden falls, has failed to establish any minimum contacts that Pallas Shipping Agency, Ltd. has with Ohio.

The letter dated April 3, 1980, which plaintiff has attached as Exhibit "A" to his opposing brief states that The International Trust Company of Liberia *acts* as Registered Agent for service of process for Erato Shipping, Inc. pursuant to the Liberian Business Corporation Act. If indeed Erato Shipping, Inc. is subject to long-arm jurisdiction, plaintiff should proceed against it. As plaintiff points out by quoting Section 1701.82(A) of the Ohio Revised Code, even if there was a valid merger, he can still proceed against the constituent corporation, Erato Shipping, Inc., in Ohio [see *Nationwide Ins. Co. v. The New York, Chicago & St. Louis Rd. Co.,* 4 Ohio App. 2d 167 (Sandusky County, 1965)], or he can proceed against the surviving corporation, Pallas Shipping Agency, Ltd., in a forum to whose jurisdiction it is subject.

Conclusion

Pallas Shipping Agency, Ltd. has *never* had contact with the State of Ohio. In November, 1977, neither it nor Erato Shipping, Inc. were aware of plaintiff's claim. Even if a valid merger then took place, requiring Pallas Shipping Agency, Ltd. to submit to *in personam* jurisdiction in Ohio would create unfair surprise well beyond the limits of fundamental fairness as embodied in the concept of due process. Accordingly, and for the reasons previously advanced in its principal brief, named defendant Pallas Shipping Agency, Ltd. renews its Motion to Quash Service and (alternatively) to Dismiss with prejudice.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

NOTICE OF SERVICE

A copy of the foregoing Reply Brief of Pallas Shipping Agency, Ltd. in Support of Motion to Quash Service and to Dismiss with Prejudice was duly mailed on this 25th day of August, 1980 to Thomas W. Gallagher, Esq., or Frank W. Cubbon Jr., and Associates Co., L.P.A., The Barristers Building, 335 North Superior Street, Toledo, Ohio 43604, attorney for plaintiff.

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
Attorneys for Defendant Pallas Shipping Agency, Ltd.

No. C 80-77

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS,
Plaintiff,

VS.

ERATO SHIPPING, INC., *et al.*,
Defendants.

OPINION AND ORDER

(Filed March 25, 1981)

WALINSKI, *J*:

This cause is before the Court on Defendant Pallas Shipping Agency, Ltd.'s motion to dismiss, plaintiff's motions for stay of proceedings and for default against Erato Shipping, Inc., and the opposition thereto.

Plaintiff is attempting to institute an action for an injury occurring May 19, 1975, aboard the M/V REGENT BOTAN for the third time. (See C 77-171, C 78-218, and the instant suit.)

Plaintiff brings suit against Erato Shipping, Inc., the bareboat charterer of the M/V REGENT BOTAN, Pallas Shipping Agency, Ltd., the surviving corporation of a merger with Erato on October 27, 1977, Japan Line Limited, a Japanese company, and Regent Botan Shipping, Inc., a Panamanian company.

Regent Botan Shipping, Inc. was not served and is no longer a party. Japan Line Limited was dismissed as a

defendant on October 16, 1980, and is no longer a defendant.

Erato Shipping, Inc. does not exist as an entity, being wholly merged into Pallas Shipping Agency, Ltd. on October 27, 1977. The purported mail service on Erato on March 11, 1980, and May 12, 1980, is ineffective unless it is service on the surviving corporation Pallas Shipping Agency, Ltd., which by the merger document assumed the assets and liabilities of Erato.

Pallas has never done any business in Ohio. It would offend a sense of fair play to allow service in personam on Pallas under Ohio's long arm statute, Ohio Revised Code § 2307.382. The requisite minimum contacts with Ohio are absent.

The purported mail service on Erato and Pallas was had in Monrovia, Liberia through a statutory agent. The absence of Erato and Pallas from the state of Ohio has tolled the statute of limitations. Service on Pallas being improper under Ohio Revised Code § 2307.382, and service on Erato being ineffective,

IT IS ORDERED that the motion to dismiss of Pallas Shipping Agency, Ltd. is well taken.

IT IS FURTHER ORDERED that the motions for default and stay are overruled. There being no remaining defendants, this cause is dismissed without prejudice.

/s/ NICHOLAS J. WALINSKI
United States District Judge

No. C 80-77

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS

vs.

ERATO SHIPPING, INC., *et al.*

JUDGMENT

(Filed March 25, 1981)

This action came on for hearing before the Court, Honorable NICHOLAS J. WALINSKI, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged case dismissed without prejudice.

/s/ NICHOLAS J. WALINSKI
United States District Judge

No. 81-3250

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH DURIS,
Plaintiff-Appellant,

v.

ERATO SHIPPING, INCORPORATED; JAPAN LINE LIMITED; REGENT BOTAN SHIPPING, INC.; PALLAS SHIPPING AGENCY, LTD.,
Defendants-Appellees.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 16, 1982)

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KENNEDY and MARTIN, *Circuit Judges;* and DUMBAULD, *Senior District Judge.**

BOYCE F. MARTIN, JR., *Circuit Judge.* Joseph Duris appeals the dismissal of his personal injury action. The District Court dismissed Duris' claim for failure to establish in personam jurisdiction over the defendant Pallas Shipping Agency, Inc.

Duris was injured in May, 1975 while working as a longshoreman on a vessel in the Port of Toledo, Ohio. He

*Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

originally tried to sue Erato Shipping, the vessel's dry boat charter. Erato Shipping was subsequently merged into the present defendant, Pallas Shipping.

On appeal, Pallas argues that the District Court properly dismissed Duris' complaint because Pallas, as distinct from Erato, has never had sufficient business contacts in Ohio to bring it within the reach of that state's long arm jurisdictional statute.[1] In the alternative, Pallas contends that Duris' action is time barred by the limitations period of the federal workmen's compensation statute under which he received benefits. We find no merit in either argument and reverse. We will consider Pallas' second, more difficult argument, first.

Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case.

According to section 33 of the Act if benefits are paid under an award, any claim the employee might have against a third party will be assigned to the employer unless the employee brings his own action within six months of such an award:

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1. Ohio Revised Code § 2307.382.

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

This subsection does not appear to cover Duris' claim. The Act, as noted earlier, makes purposeful use of the term "award." Thus, if benefits are paid without an award, there shall be no assignment and no six-month limitation period. Nevertheless, at least one court has held that the mere receipt of compensation benefits constitutes an "award" and so triggers section 33. *Larson v. Associated Container Transport (Australia)*. 459 F. Supp. 561 (E.D.Va. 1978). Similarly, the Fourth Circuit has held that the routine filing of the documents which must accompany even benefits paid without an award are sufficient ratification and acceptance to constitute a formal award. *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). On the basis of this authority, Pallas argues that Duris' acceptance of compensation in May, 1975 triggered section 33 and its short statute of limitations, which expired prior to the 1977 commencement of this action. With all respect, we decline to follow *Liberty Mutual* and *Larson*.

Those cases' rationale for ignoring the narrow assignment embodied in section 33 is that unless the assignment provision is read broadly to include every longshoreman's claim, the many claims paid without an award will never be assigned to the employer. This result, the argument continues, is inequitable because without the assignment,

the employer, or its subrogee insurance carrier, cannot seek reimbursement from any negligent third party. Thus, to protect itself, the employer would needlessly controvert every claim in order to gain a formal award and hence the opportunity for an assignment. Unless remedied by a broad interpretation of section 33, these non-disputes will increase costs while slowing payments to injured employees. *See Liberty Mutual, supra,* at 1103.

This fear is unfounded. Employers are not dependent upon the employee's claim for reimbursement purposes. In *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969), the Supreme Court held that the employer's remedy under section 33 is not exclusive. Instead, in the typical situation where a stevedoring contractor, the employer, seeks reimbursement from a negligent shipowner, federal maritime law would permit a tort action in the employer's own right for breach of the shipowner's duty of due care:

> We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages.
>
> As we held in Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 632, 3 L Ed 2d 550, 555, 79 S Ct 406, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the ship owner's negligence

> caused damages to the stevedoring contract's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

Id. at 414-415. *See also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that occurrence.[2] H. R. Rep.

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2. The United States Employment Compensation Commission was the moving force behind this amendment. Lewis Dalby, chief counsel for the Commission, made the following comments at the July 31, 1935 House of Representatives Subcommittee hearing on H.R. 8293:

> The only remaining section, section 10, relates to the provision of section 33, which provides that the acceptance of compensation by an injured employee shall work an assignment of his right against a third party who has caused his injury. Undoubtedly, very often employees accept com-

(Continued on following page)

No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra,* at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six-month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim.

In contrast, where a claim has been paid pursuant to an award, the employe, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in light of the employer's greater ability to maintain a legal action. Alternatively, the employee will realize that he must act rather quickly or risk losing the right to control the action altogether.

In rebuttal, appellees argue that an informed decision on the employee's part is not critical because in any in-

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Footnote continued—

> pensation without realizing that effect upon their rights. So that the purpose of this is to make the assignment of the right of action arise only when compensation is accepted on an award made by the deputy commissioner. In other words, when the injury occurs, the mere fact that the employer or insurance carrier hurries up and sends a payment around, which is accepted, without knowing that that would take away the entire right, which may be very valuable, that assignment would not arise in such a case, but only if the case had gone to the deputy commissioner and had been formally heard and an award issued, so that there would be opportunity for the injured man, or those acting for him or as beneficiaries, to find out the effect of such an acceptance of compensation before taking it.

Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary, 74th Cong., 1st Cong., 1st Sess. (1935).

stance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. Furthermore, the Act provides an additional incentive by allowing the employer to keep twenty percent of any recovery over the costs of litigation and all compensation due. 33 U.S.C. § 933(d). Given these inducements and the greater resources of the employer, a broad interpretation of section 33 will benefit both the employer and the employee.

This analysis loses its appeal, however, if we consider the very real threat of conflicting interests between employer and employee.

As noted earlier, the most likely third-party tortfeasor will be the vessel's owner or charterer, the owner or lessee of the longshoreman's workplace. On the other hand, the employer-assignee is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. The juxtaposing of this stevedore-client relationship between the employee and the tortfeasor presents obvious disincentives to the bringing of the employee's action by the employer. If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third-party client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third-party client alleviate the conflict. The insurance company can hardly ignore the business relationships of its own clients. This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33. If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increas-

ingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court.

We will not, therefore, read section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third-party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F.Supp. 1308 (E.D.Penn. 1980).

The second question is quickly resolved. In its order, the court below concluded that service of process against Pallas Shipping was improper because that company had never done any business in Ohio. Requiring Pallas to submit to suit in Ohio would, in the court's opinion, offend the constitutional notions of fair play set out in *International Shoe v. Washington*, 326 U.S. 310 (1945).

This ruling was erroneous. Although Pallas Shipping has never had any business contacts in Ohio, its constituent corporation, Erato Shipping clearly has. No one disputes that Erato was the bareboat charterer of the vessel upon which Duris was injured and that Erato subsequently merged with Pallas. In this diversity action we are bound to apply Ohio law. *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1187 (6th Cir.), *cert. denied sub nom. Insurance Co. of North America v. Poyner*, 449 U.S. 84 (1980). That

law clearly states that after a merger, the surviving corporation is liable for all claims against the constituent corporation:

> When a merger of consolidation becomes effective:
>
> The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities of defending shareholders. Any claim existing or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of Appeal, if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place.

Ohio Revised Code § 1701.82(A).

Thus, pursuant to this statute, if Duris can establish Ohio contacts sufficient to gain jurisdiction over Erato Shipping, he may thereby gain jurisdiction over Pallas Shipping. Any other ruling would allow corporations to immunize themselves by formalistically changing their titles.

The judgment is reversed and remanded for proceedings consistent with this opinion.

OMB No. 44-R0001

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

PAYMENT OF COMPENSATION WITHOUT AWARD

OWCP CASE NUMBER

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED

CASE FILE NUMBER 211-52 3002

NOTE: *This notice is to be filed with the Deputy Commissioner when the first payment is made. A copy should be sent to the person to whom compensation was paid.*

1. NAME OF INJURED PERSON (First, middle, last)
Joseph E. Duris

2. ADDRESS OF INJURED PERSON (Number, street, city, state and zip code)
1207½ Nevada Street Toledo, Ohio

3. DATE OF ACCIDENT OR FIRST ILLNESS (Month, day, year)
May 19, 1975

4. DATE DISABILITY BEGAN (Month, day, year)
May 19, 1975

5. NAME OF INJURED OR DEPENDENTS OF INJURED, TO WHOM COMPENSATION WILL BE PAID
Joseph E. Duris

6.
AVERAGE WEEKLY WAGE $ 99.00 MULTIPLIED BY 2/3 = COMPENSATION RATE (Same if maximum rate is being paid) $ 66.57 / 74.57

7. COMPENSATION WILL BE PAID FROM (Month, day, year) 5-20-75
Compensation in the amount of $149.14 will be paid every two weeks.
UNTIL NOTICE IS GIVEN THAT PAYMENT HAS BEEN STOPPED OR SUSPENDED

10. DATE OF FIRST PAYMENT (Month, day, year)
First payment will be paid June 2,1975 to cover 5-20-75 through 6-2-75

11. MEDICAL CARE AND TREATMENT HAS BEEN ☒ HAS NOT BEEN ☐ PROVIDED BY A PHYSICIAN OR HOSPITAL CHOSEN BY INJURED PERSON (Check appropriate box).

12. NAME OF EMPLOYER
Edward J. DeCartolo Corp., Toledo Overseas Terminal, Inc.

13. ADDRESS OF EMPLOYER (Number, street, city, state and zip code)
3319 St. Lawrence Drive
Toledo, Ohio 43605

14. NAME OF INSURANCE CARRIER
Seaboard Fire & Marine - Underwriters Adjusting Company

15. AUTHORIZED SIGNATURE
Allan R. Lacy X_____

16. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 15
Claims Adjuster

17. DATE SIGNED
06-02-75

GPO 888-849

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Form LS-206
(Rev. 9/73)

AFFIDAVIT OF DOUGLAS R. DENNY

STATE OF OHIO)
)
CUYAHOGA COUNTY)

DOUGLAS R. DENNY, being first duly sworn, deposes and says:

I am one of the attorneys for defendant Japan Line Limited in Civil Action No. C80-77, pending in the United States District Court for the Northern District of Ohio, Western Division.

On March 12, 1980, I was advised by telephone that Form LS-208 was filed in the compensation claim of Joseph Duris on April 26, 1977. The party advising me was Mr. Harold Levinson, who is a hearing examiner with the Department of Labor in Chicago, Illinois. Mr. Levinson checked his records and advised that Mr. Duris's file, No. 9-4012, showed a filing of said Form LS-208 on April 26, 1977.

Further affiant sayeth naught

/s/ DOUGLAS R. DENNY

Sworn to before me and subscribed in my presence on this 13 day of March, 1980.

/s/ DAVID M. SPOTTS
Notary Public

David M. Spotts, Attorney At Law, Notary Public-State of Ohio. My commission has no expiration date. Section 147.03 R. C.